

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

RUFUS IDOWU,

Plaintiff,

vs.

WESLEY ASTHEIMER, et al.,

Defendants.

Case No: C 10-02672 SBA

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Docket 10

15 Plaintiff Rufus Idowu filed the instant pro se action against Defendants Wesley,
16 Astheimer, Asset Recovery and YRC Inc. (“YRC”), alleging claims for wire fraud, 18
17 U.S.C. § 1343, and mail fraud, 18 U.S.C. § 1341. The parties are presently before the
18 Court on Defendant YRC’s motion to dismiss, pursuant to Federal Rules of Civil Procedure
19 12(b)(6), or, alternatively, for a more definite statement, pursuant to Rule 12(e). Having
20 read and considered the papers filed in connection with this matter and being fully
21 informed, the Court hereby GRANTS Defendant YRC’s motion to dismiss. The Court, in
22 its discretion, finds this matter suitable for resolution without oral argument. See
23 Fed.R.Civ.P. 78(b); Civ. L.R. 7-1(b).

24 | I. BACKGROUND

Defendant Wesley Astheimer owns Asset Recovery, which sells recycled and off-lease computers and computer-related merchandise, which he advertises on the internet. Id. ¶ 2. On April 16, 2010, after viewing an internet advertisement, Plaintiff contacted Asset Recovery “to request an invoice for 100 units of off-lease Pentium 4 Laptops.” Id. ¶ 8. In

1 response, Asset Recovery emailed Plaintiff “an invoice for 100 units of off-lease Pentium 4
 2 laptops at the rate of \$60 per unit....” Id. Additionally, Asset Recovery quoted him a price
 3 of \$425.00 for shipping, bringing the total transaction cost to \$6,425.00. Id. On the same
 4 day, Plaintiff wired the sum of \$6,425.00 from his bank account in Oakland, California, to
 5 Asset Recovery’s bank account at North West Savings Bank, in Curwensville,
 6 Pennsylvania. Id. ¶ 9.

7 On April 28, 2010, Asset Recovery shipped one pallet containing twenty
 8 “broken/empty casing/junk desktop computers.” Id. ¶ 10. Plaintiff refused the shipment.
 9 Id. He called Asset Recovery, but was “threatened and told never to call back.” Id.
 10 Plaintiff also alleges that YRC, the shipping company, inflated the weight of the shipment.
 11 Id. ¶ 13. The YRC bill of lading received by Plaintiff stated that the shipment weighed
 12 1,000 pounds, and based on that weight, charged him \$1,161.33 for shipping. Id.
 13 However, when Plaintiff went to YRC’s office in Oakland on May 3, 2010, a YRC
 14 employee disclosed that his shipment weighed only 350 pounds. Id. ¶ 12.

15 On June 18, 2010, Plaintiff filed the instant action in this Court against Wesley,
 16 Astheimer, Asset Recovery and YRC. In his Amended Complaint filed on June 22, 2010,
 17 he alleges two claims for relief: (1) Wire Fraud, 18 U.S.C. § 1343, against all Defendants;
 18 and (2) Mail Fraud, 18 U.S.C. § 1341, against YRC only. On August 9, 2010, YRC filed
 19 the instant motion to dismiss. Plaintiff filed an untimely opposition on October 25, 2010.
 20 Dkt. 21.¹ The matter was reassigned to this Court on October 25, 2010 (from Magistrate
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25 ¹ On January 7, 2011, Plaintiff filed another brief styled as “Memorandum of Points
 26 and Authorities in Opposition to YRC’s Inc. [sic] Reply to Motion to Dismiss.” Dkt. 28.
 27 Plaintiff filed this document in violation of Civil Local Rule 7-3(d), which provides that
 28 once a reply brief is filed, no additional documents may be filed in connection with the
 pending motion absent prior Court approval. Plaintiff did not seek nor obtain such
 approval. Plaintiff’s unauthorized brief will be stricken from the record. See Wood v.
Santa Barbara Chamber of Commerce, 705 F.2d 1515, 1519 (9th Cir. 1983) (court may
 strike unauthorized filing).

1 Judge Beeler), and hearing on YRC's motion was rescheduled to January 11, 2011. Dkt.
 2 17, 18. The matter has been fully briefed and is ripe for decision.²

3 **II. LEGAL STANDARD**

4 A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the
 5 plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support
 6 a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
 7 1990). To survive a motion to dismiss for failure to state a claim, a complaint generally
 8 must satisfy the notice pleading requirements of Federal Rule of Civil Procedure 8, which
 9 requires that the complaint include a "short and plain statement of the claim showing that
 10 the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2); see also Swierkiewicz v. Sorema
 11 N.A., 534 U.S. 506, 508 (2002).

12 When considering a Rule 12(b)(6) motion, a court must take the allegations as true
 13 and construe them in the light most favorable to plaintiff. See Knievel v. ESPN, 393 F.3d
 14 1068, 1072 (9th Cir. 2005). However, "the tenet that a court must accept as true all of the
 15 allegations contained in a complaint is inapplicable to legal conclusions. Threadbare
 16 recitals of the elements of a cause of action, supported by mere conclusory statements, do
 17 not suffice." Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009). "While legal
 18 conclusions can provide the complaint's framework, they must be supported by factual
 19 allegations." Id. at 1950. Those facts must be sufficient to push the claims "across the line
 20 from conceivable to plausible[.]" Id. at 1951 (quoting Bell Atl. Corp. v. Twombly, 550
 21 U.S. 544, 557 (2007)). Ultimately, the allegations must "give the defendant fair notice of
 22 what the ... claim is and the grounds upon which it rests." Twombly, 550 U.S. at 555
 23

24 ² There is no indication in the record that Defendants Wesley Asthiemer and Asset
 25 Recovery have been served in this action. On September 2, 2010, Magistrate Judge Beeler,
 26 who was then presiding over this action, notified Plaintiff of his obligation under Rule 4(m)
 27 to effect service of summons and the complaint within 120 days. 9/2/10 Order, Dkt. 13.
 28 Judge Beeler directed that Plaintiff complete service of process by no later than October 16,
 2010, and to file proofs of service accordingly. Id. Defendants Wesley Asthiemer and
 Asset Recovery have not appeared in this action, and Plaintiff has not submitted any proof
 that either has been properly served. Accordingly, under Rule 4(m), these Defendants are
 dismissed from the action.

1 (internal quotations and citation omitted). “If a complaint is dismissed for failure to state a
 2 claim, leave to amend should be granted unless the court determines that the allegation of
 3 other facts consistent with the challenged pleading could not possibly cure the deficiency.”
 4 Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986).

5 **III. DISCUSSION**

6 **A. DISMISSAL OF PLAINTIFF’S CLAIMS**

7 The party seeking relief in a federal court action “bears the burden of showing that
 8 he has standing for each type of relief sought.” Summers v. Earth Island Inst., --- U.S. ---,
 9 129 S.Ct. 1142, 1149 (2009).³ In addition to constitutional standing under Article III, a
 10 plaintiff must demonstrate prudential standing, i.e., that “plaintiff has been granted a right
 11 to sue by the statute under which he or she brings suit.” City of Sausalito v. O’Neill, 386
 12 F.3d 1186, 1199 (9th Cir. 2004). With respect to the claims at issue, courts have
 13 consistently found that the mail and wire fraud statutes do not confer a private right of
 14 action. See, e.g., Wilcox v. First Interstate Bank, 815 F.2d 522, 533 n.1 (9th Cir. 1987)
 15 (“there is no private right of action for mail fraud under 18 U.S.C. § 1341”) (Boochever, J.,
 16 dissenting); Wisdom v. First Midwest Bank of Poplar Bluff, 167 F.3d 402, 407-408 (8th
 17 Cir. 1999) (finding no private right of action exists under either mail or wire fraud statutes);
 18 Napper v. Anderson, 500 F.2d 634, 636 (5th Cir. 1974) (“The wire fraud act, 18 U.S.C.
 19 § 1343, is closely analogous to the mail fraud statute, 18 U.S.C. § 1341, and likewise
 20 evidences no intent of Congress to grant additional federal question jurisdiction in civil
 21 cases”). Since Plaintiff cannot state a claim directly under the mail or wire fraud statutes,
 22 his first and second claims for relief must be dismissed.

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25 ³ YRC predicates its motion to dismiss on the contention that Plaintiff’s claims are
 26 insufficiently pled under Rule 8(a) and fail to plead fraud with particularity under Rule
 27 9(b). While YRC is correct that the pleadings are deficient, the Court must determine, as a
 28 “threshold question,” whether Plaintiff has prudential standing to sue in the first instance.
See Newdow v. Rio Linda Union School Dist., 597 F.3d 1007, 1041 (9th Cir. 2010).

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1 **B. LEAVE TO AMEND**

2 The question remains whether Plaintiff should be granted leave to amend. Although
 3 Plaintiff cannot sue directly under the mail and wire fraud statutes, a violation of those
 4 provisions could serve as predicate acts in support of a claim under the Racketeer
 5 Influenced and Corrupt Organizations Act (“RICO”). See Sanford v. MemberWorks, Inc.,
 6 625 F.3d 550, 557 (9th Cir. 2010). RICO “makes it ‘unlawful for any person employed by
 7 or associated with any enterprise engaged in, or the activities of which affect, interstate or
 8 foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such
 9 enterprise’s affairs through a pattern of racketeering activity or collection of unlawful
 10 debt.’” Beck v. Prupis, 529 U.S. 494, 497 (2000). To state a civil RICO claim, the plaintiff
 11 must allege the (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering
 12 activity, establishing that (5) the defendant caused injury to the plaintiff’s business or
 13 property. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985).

14 Should Plaintiff decide to amend his complaint to allege a RICO claim based on
 15 mail and wire fraud, he should be aware of its rigorous pleading requirements. In addition
 16 to alleging facts to establish each of the elements of a RICO claim, Plaintiff must allege any
 17 claims of fraud (including wire fraud and mail fraud) alleged with particularity under
 18 Federal Rule of Civil Procedure 9(b). Thus, “[t]o avoid dismissal for inadequacy under
 19 Rule 9(b), [the] complaint would need to state the time, place, and specific content of the
 20 false representations as well as the identities of the parties to the misrepresentation.”
 21 Sanford, 625 F.3d at 558 (internal quotations and citation omitted). This means that the
 22 complaint must allege “the who, what, when, where, and how” of the alleged fraudulent
 23 conduct, Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997), and “set forth an explanation
 24 as to why [a] statement or omission complained of was false and misleading,” In re
 25 GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc); see Fecht v. Price
 26 Co., 70 F.3d 1078, 1082 (9th Cir. 1995). Where multiple defendants are involved, the
 27 plaintiff also must identify the role of each defendant in the alleged fraudulent scheme. See
 28 Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007). Allegations of fraud cannot

1 be made in information and belief. Moore v. Kayport Package Exp., Inc., 885 F.2d 531,
 2 540 (9th Cir. 1989).

3 In the event that Plaintiff has no interest in attempting to allege a RICO claim—or
 4 does not have the ability to allege, in good faith and consistent with Federal Rule of Civil
 5 Procedure 11, specific facts to meet to the level of specificity required—he need not
 6 attempt to amend his pleadings to allege a RICO claim. However, Plaintiff’s decision not
 7 to pursue a RICO claim does not prevent him from considering causes of action based on
 8 state law that he may file in a state court (i.e., the Superior Court of California”). See
 9 Hunter v. Philip Morris USA, 582 F.3d 1039, 1042 (9th Cir. 2009) (“[T]he plaintiff is ‘the
 10 master of his complaint’ and may ‘avoid federal jurisdiction by relying exclusively on state
 11 law.’”) (quoting Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1106 (9th
 12 Cir. 2000)). The Court notes Plaintiff’s statement in his opposition that YRC allegedly
 13 engaged in “fraud and intentional misconduct.” Pl.’s Opp’n at 2. Fraud is a state law cause
 14 of action, meaning that Plaintiff is free to bring a civil action for fraud in state court.⁴
 15 California law also provides consumers the right to sue for any “unlawful, unfair or
 16 fraudulent business act or practice,” pursuant to the Unfair Competition Law, Cal. Bus. &
 17 Prof. Code § 17200. Ultimately, however, the decision of which claims to bring, if any,
 18 and where to bring them, if at all, is within the control of Plaintiff.

19 Should Plaintiff decide to proceed in this Court, he should be aware that although he
 20 is acting pro se (i.e., without an attorney) he nevertheless remains obligated to follow the
 21 same rules as represented parties. See Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995)
 22 (“Although we construe pleadings liberally in their favor, pro se litigants are bound by the
 23 rules of procedure.”) (per curiam); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987)
 24 (same). Self-representation is not an excuse for non-compliance with Court rules. See
 25 Swimmer v. I.R.S., 811 F.2d 1343, 1344 (9th Cir. 1987) (“[i]gnorance of court rules does

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 27 ⁴ “The elements of fraud are a misrepresentation, knowledge of its falsity, intent to
 28 defraud, justifiable reliance and resulting damage.” Gil v. Bank of Am., Bank of Am., 138
 Cal.App.4th 1371, 1381 (2006).

1 not constitute excusable neglect, even if the litigant appears pro se.”) (citation omitted).
2 Plaintiff’s failure to comply with any procedural requirements, including any Court order,
3 may result in the imposition of sanctions up to and including dismissal of the action. See
4 Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992).

5 In addition, Plaintiff is advised that all of his submissions in federal court are subject
6 to Federal Rule of Civil Procedure 11, which states, in relevant part, as follows:

7 By presenting to the court a pleading, written motion, or other
8 paper—whether by signing, filing, submitting, or later
advocating it—an attorney or unrepresented party certifies that
9 to the best of the person’s knowledge, information, and belief,
formed after an inquiry reasonable under the circumstances:

10 (1) it is not being presented for any improper purpose, such as
to harass, cause unnecessary delay, or needlessly increase the
11 cost of litigation;

12 (2) the claims, defenses, and other legal contentions are
warranted by existing law or by a nonfrivolous argument for
extending, modifying, or reversing existing law or for
13 establishing new law;

14 (3) the factual contentions have evidentiary support or, if
specifically so identified, will likely have evidentiary support
after a reasonable opportunity for further investigation or
discovery; and

15 (4) the denials of factual contentions are warranted on the
evidence or, if specifically so identified, are reasonably based
on belief or a lack of information.

16 A violation of Rule 11’s provisions may result in the imposition of monetary sanctions
17 against the offending party. Fed.R.Civ.P. 11(c). This means that Plaintiff could be liable
18 for sanctions to the opposing party if his claims are deemed “frivolous” within the meaning
of Rule 11.

19 **IV. CONCLUSION**

20 For the reasons state above,

21 **IT IS HEREBY ORDERED THAT:**

22 1. Defendant YRC’s motion to dismiss for failure to state a claim is
23 GRANTED.
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1 2. Plaintiff shall have until **January 21, 2011**, to file a Second Amended
2 Complaint. **Should Plaintiff fail to timely file a Second Amended Complaint, the**
3 **instant action will be dismissed and the file will be closed.** However, the termination of
4 this action will result in the dismissal with prejudice of any federal claims, but will *not*
5 foreclose Plaintiff from pursuing any state law claims in state court.

6 3. The motion hearing and Case Management Conference scheduled for January
7 11, 2011, are VACATED. The Case Management Conference is CONTINUED to **May 5,**
8 **2011 at 2:30 p.m.** The parties shall meet and confer prior to the conference and shall
9 prepare a joint Case Management Conference Statement which shall be filed no later than
10 ten (10) days prior to the Case Management Conference. The statement shall comply with
11 the Standing Order for All Judges of the Northern District of California and the Standing
12 Order of this Court. Plaintiff shall be responsible for filing the statement as well as for
13 arranging the conference call. All parties shall be on the line and shall call (510) 637-3559
14 at the above indicated date and time.

15 4. The action is dismissed without prejudice as to Defendants Wesley Asthiemer
16 and Asset Recovery, in accordance with Federal Rule of Civil Procedure 4(m).

17 5. The Clerk shall strike Docket 28 from the record.
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1 6. This Order terminates Docket 10.
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3 IT IS SO ORDERED.

4 Dated: January 11, 2011
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SAUNDRA BROWN ARMSTRONG
United States District Judge

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3 UNITED STATES DISTRICT COURT
4 FOR THE
NORTHERN DISTRICT OF CALIFORNIA

5 RUFUS IDOWU,
6 Plaintiff,

7 v.

8 WESLEY ASTHEIMER et al,
9 Defendant.

10 _____ /
11 Case Number: CV10-02672 SBA

12 **CERTIFICATE OF SERVICE**

13 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
14 Court, Northern District of California.

15 That on January 11, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
16 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
17 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
located in the Clerk's office.

18
19
20 Rufus Idowu
21 2912 14th Avenue #102
Oakland, CA 94606

22 Dated: January 11, 2011

23 Richard W. Wieking, Clerk

24 By: LISA R CLARK, Deputy Clerk